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Jumaiah bt Maruan @ Marwan v Hong Yee Mei and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02–2939–11 OF 2011, S-02–3060–12 OF 2011 AND S-02–1089–05 OF 2012

RAMLY ALI, MOHTARUDIN BAKI AND HAMID SULTAN JJCA

20 FEBRUARY 2014

Land Law — Sale of land — Restraints on dealing — Native land title contained restriction that no rights or powers granted by title could be transferred by way of power of attorney or any other means — Whether acquisition of land by party by means of memorandum of understanding, escrow documents and/or power of attorney unlawful and null and void under s 24 of the Contracts Act 1950 — Whether evidence showed party not genuine native and hence could not acquire land from native owner

The common respondent in Appeal Nos 2939 and 3060, Hong Yee Mei ('Hong'), signed a sale and purchase agreement ('SPA') with the appellant in Appeal No 3060, Makwan bin Kanapiah ('Makwan') to buy a piece of land, which the authorities had offered to alienate to Makwan, for RM3,000. In addition to the SPA, Makwan had signed a memorandum of transfer in escrow, a memorandum of sublease agreement and a letter declaring Hong had liberty to enforce the SPA by way of specific performance. Hong paid the purchase price and entered into possession of the land but ten years later received a demand letter from Makwan (in whose name the document of native title to the land had been issued) to vacate the land. Makwan had in the meantime transferred the land to his daughter, Jumaiah bt Maruan @ Marwan ('Jumaiah'), the appellant in Appeal No 2939. Hong filed an action in the High Court, inter alia, for specific performance of the SPA, damages for breach of contract and a declaration that the transfer of the land to Jumaiah was null and void. One of the arguments in the High Court was that Hong was not in fact a native of Sabah and that the native certificate she produced was a fake. The High Court allowed Hong's claim and set aside the transfer of the land to Jumaiah, holding that Hong's 'native' status could only be challenged at the native court; that Makwan was bound by the terms of the SPA; that Jumaiah was not a bona fide purchaser of the land and that the transfer to her was without the express permission of the authorities. In the instant appeal against the decision, it was contended that Hong had no rights to the land as she failed to prove she was a native; that the title to the land expressly provided that no rights or powers granted by the title could be transferred by means of power of attorney or any other means; and that any contravention of those terms would

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render any purported dealing unlawful, illegal and null and void under s 24 of the Contracts Act 1950.

Held, allowing the Appeal Nos 2939 and 3060 and dismissing the Appeal No 1089 with costs of RM5,000:

(1) The trial judge failed to consider the effect of s 24 of the Contracts Act 1950 ('Act') in the right perspective. Having hold of a 'native certificate' alone did not mean the Court could entertain claims which attracted s 24 of the Act. When there was sufficient evidence to show the 'native certificate' was not genuine or had been obtained by unlawful means, the sting of illegality and its jurisprudence entailed the court not to allow the holder any relief pursuant to s 24 (see paras 13(d)–(e)).

(2) Apart from the 'native' issue, the appeal was allowed for the reason restrictions on the title did not permit the property to be acquired by Hong by way of such instruments as memorandum of understanding or escrow documents and/or power of attorney. Hong's modus operandi to acquire the property clearly breached the law and attracted s 24 of the Act and deprived her of the right to specific performance as well as the other reliefs she had prayed for (see paras 13(b) & 16).

(3) On the issue of the 'native certificate' and its immutability, it had to be first established before the High Court that it was genuine. The Court was only restricted from inquiring whether or not the person holding a native certificate was in fact a native. In essence, the High Court was only restricted from giving a declaration as to the status of native and the decision of the native court would be conclusive evidence for the particular purpose (see para 13(c)).

[Bahasa Malaysia summary

Responden dalam Rayuan No 2939 dan 3060, Hong Yee Mei ('Hong'), menandatangani perjanjian jual beli ('PJB') dengan perayu dalam Rayuan No 3060, Makwan bin Kanapiah ('Makwan') untuk membeli sebidang tanah, yang mana pihak berkuasa telah menawarkan untuk memberi milik kepada Makwan, untuk RM3,000. Dalam tambahan kepada PJB, Makwan telah menandatangani memorandum pemindahan dalam eskrow, memorandum perjanjian sub-pajakan dan surat mengisytiharkan Hong mempunyai kebebasan untuk menguatkuasa PJB tersebut melalui pelaksanaan spesifik. Hong membayar harga belian dan memasuki milikan hartanah tetapi sepuluh tahun kemudiannya menerima surat tuntutan daripada Makwan (yang mana dokumen hakmilik kepada tanah telah dikeluarkan dalam namanya) untuk mnegosongkan tanah tersebut. Makwan sementara itu memindahkan tanah tersebut kepada anak perempuannya, Jumaiah bt Maruan @ Marwan ('Jumaiah'), perayu dalam Rayuan No 2939. Hong memfailkan tindakan di Mahkamah Tinggi, antara lain, untuk pelaksanaan spesifik PJB, ganti rugi

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untuk kemungkiran kontrak dan perisytiharan bahawa pemindahan tanh tersebut kepada Jumaiah adalah terbatal dan tak sah. Salah satu penguhajahn di mahkamah adalah bahawa Hong sebenarnya bukan anak negeri Sabah dan bahawa sijil anak negeri yang dikemukakannya adalah palsu. Mahkamah Tinggi membenarkan tuntutan Hong dan mengetepikan pemindahan tanah tersebut kepada Jumaiah, memutuskan bahawa status 'native' Hong hanya boleh dicabar di mahkamah anak negeri; bahawa Makwan terikat oleh terma-terma PJB; bahawa Jumaiah bukan pembeli bona fide tanah dan bahawa pemindahan kepadanya adalah tanpa izin nyata pihak berkuasa. Dalam rayuan ini terhadap keputusan, ia dihujahkan bahawa Hong tidak mempunyai hak kepada tanah kerana dia gagal untuk membuktikan dia adalah anak negeri; bahawa hakmilik kepada tanah secara nyata memperuntukkan bahawa tiada hak atau kuasa diberikan oleh hakmilik boleh dipindahka dengan cara surat kuasa wakil atau apa-apa cara lain; dan bahawa apa-apa pelanggaran terma tersebut akan menyebabkan apa-apa pengurusan menyalahi undang-undang dan terbatal dan tak sah di bawah s 24 Akta Kontrak 1950 ('Akta').

Diputuskan, membenarkan Rayuan No 2939 dan 3060 dan menolak Rayuan No 1089 dengan kos sebanyak RM5,000:

(1) Hakim perbicaraan gagal untk mempertimbangkan kesan s 24 Akta dalam perspektif yang betul. Setelah memutuskan hanya 'native certificate'tidak bermaksud mahkamah boleh mendengar tuntutan yang membangkitkan s 24 Akta. Apabila terdapat keterangan yang mencukupi untuk menunjukkan 'native certificate' bukan tulen atau telah diperolehi dengan cara menyalahi undang-undang, sengatan kepenyalahan undang-undang dan jurisprudensnya melibatkan mahkamah untuk tidak membenarkan pemegang apa-apa relief berikutan s 24 (lihat perenggan 13(d)–(e)).

(2) Selain daripada isu 'native', rayuan dibenarkan atas alasan sekatan atas hakmilik tidak membenarkan hartanah diambil alih oleh Hong melalui instrumen seperti memorandum persefahaman atau dokumen eskrow dan/atau surat kuasa wakil. *Modus operandi* Hong untuk mendapatkan hartanah jelas memungkiri undang-undang dan membangkitkan s 24 Akta Kontrak 1950 dan menafikannya terhadap hak kepada pelaksanaan spesifik dan juga relief lain yang dipohonnya (lihat perenggan 13(b) & 16).

(3) Atas isu 'native certificate' dan keadaan yang tidak berubah, ia mesti dibuktikan telebih dahulu di hadapan Mahkamah Tinggi bahawa ia adalah tulen. Mahkamah hanya dihadkan daripada mempersoalkan sama ada atau tidak orang yang memegang sijil anak negeri sebenarnya anak negeri. Pada dasarnya, Mahkamah Tinggi hanya dihadkan daripada memberikan perisytiharan terhadap status anak negeri dan keputusan

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A mahkamah anak negeri akan menajdi keterangan konklusif untuk tujuan tertentu (lihat perenggan 13(c)).]

Notes

B For a case on restraints on dealing, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5043.

Cases referred to

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
Joseph Paulus Lantip v Lian Kee Chu & Ors [2011] 6 CLJ 399, CA (refd)
C *Madlis bin Azid v Board of Offices (Pursuant to section 3(3) Interpretation Definition of Native) Ordinance (Sabah Cap 64) & Anor* [2012] MLJU 666, HC (refd)

Legislation referred to

D Administration of Natives and Small Estates Ordinance 1941 s 23
Contracts Act 1950 s 24
Evidence Act 1950 s 44
Interpretation (Definition of Native) Ordinance of Sabah (Cap 64) s 3(2), (3), (4)
E Native Court Enactment 1992 s 16
Sabah Land Ordinance (Cap 68) s 17

Appeal from: Civil Suit Nos T(22)12 of 2008, T22–12 of 2008 and T(22)73 of 2010 (High Court, Tawau)

F

Jhasarry P Kang (Kang Advocates) in Civil Appeal No S-02–2939–11 of 2011 for the appellant.
Ansari Abdullah (Ansari & Co) in Civil Appeal No S-02–3060–12 of 2011 for the appellant.
G *Faridah Hanam Mohd (Johari & Zelika) in Civil Appeal S-02–1089–05 of 2012 for the appellant.*
Faridah Hanam Mohd (Johari & Zelika) in Civil Appeal S-02–2939–11 of 2011 for the respondents.
Faridah Hanam Mohd (Johari & Zelika) in Civil Appeal No S-02–3060–12 of 2011 for the respondents.
H *Victor Chong (Poh & Victor Chong) in Civil Appeal No S-02–1089–05 of 2012 for the respondent.*

Hamid Sultan JCA (delivering judgment of the court):

I

[1] Appeals No 2 and 4 (the first appeal), and No 7 (the second appeal) in the cause list came up for hearing on 13 May 2013. As Hong Yee Mei was the common plaintiff on all suits, upon the request of the parties the appeals were heard one after another and decision delivered on the same day. My learned

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brothers Ramly bin Hj Ali JCA and Mohtarudin bin Baki JCA have read the draft judgment and approved the same.

[2] The first appeal deals with the judgment of YA John Ko Wai Seng JC and the second appeal deals with the judgment of YA Douglas Cristo Primas Sikayun JC.

DESCRIPTION OF PARTIES

S-02-2939-11/2011

Between

JUMAIAH BINTI MARUAN @ MARWAN ... APPELLANT/2nd DEFENDANT

And

HONG YEE MEI ... RESPONDENT/PLAINTIFF

S-02-3060-12/2011

Between

MAKWAN BIN KANAPIAH ... APPELLANT/1st DEFENDANT

And

HONG YEE MEI ... RESPONDENT/PLAINTIFF

S-02-1089-05/2012

Between

HONG YEE MEI ... APPELLANT/PLAINTIFF

And

(1) MOKTAR BIN AHMAD ... RESPONDENTS/DEFENDANTS

(2) NOOR FAXILAH BINTI MOKTAR

THE PARTIES — FIRST APPEAL

[3] The appellant in appeal No 2 ie Suit No S-02–2939–11 of 2011 is the second defendant in the High Court. The appellant in appeal No 4 ie Suit No S-02–3060–12 of 2011 is the first defendant in the High Court. The grounds of judgment for both the appeals are the same.

BRIEF FACTS

[4] The plaintiff entered into a sale and purchase agreement dated 15 August 1997 for purchase of land with the first defendant. At that material time, the Department of Land Survey had only given a letter dated 18 July 1979, which

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was just an offer to alienate the land. The plaintiff had paid the full purchase price of RM3,000 and had entered into the land and taken possession of it. The first defendant subsequent to the signing of the agreement had also executed a memorandum of transfer in escrow, a memorandum of sub-lease agreement and a letter of undertaking dated 15 August 1997 which says the plaintiff was at liberty to enforce the agreement by way of specific performance.

[5] On 30 January 2007 the plaintiff received a letter of demand from the first defendant seeking vacant possession on the grounds the said land had been sold to Moktar bin Ahmad. In consequence, the plaintiff lodged a caveat on 23 March 2007.

[6] On 25 February 2010 the first defendant transferred the land to the second defendant (daughter of the first defendant).

[7] The plaintiff filed this action against the defendants praying for specific performance and damages for breach of contract. And also a declaration that the plaintiff was the beneficial owner and the transfer to the second defendant was null and void and the second defendant to deliver the original issue document of title and also a direction that the registrar of titles register the land in favour of the plaintiff against the second defendant.

THE FIRST DEFENDANT'S DEFENCE

[8] The first defendant denied entering into an agreement with the plaintiff and asserts that document of native title was issued in the first defendant's favour on 15 September 2006.

THE SECOND DEFENDANT'S DEFENCE

[9] The second defendant admits that the land was transferred to her on 25 February 2010 for love and affection and that the transfer was done one week before the commencement of the trial. The second defendant also counterclaimed against the plaintiff for trespass and prayed for damages and vacant possession.

THE HIGH COURT

[10] Before the High Court, it was argued that the plaintiff was not a native even though the plaintiff claimed he was a native. The learned High Court judge had held as follows:

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(a) the plaintiff status as native must only be challenged at the Native Court of Sabah;

(b) there was evidence that the first defendant did enter and signed the agreement, and therefore bound by the terms of the agreement;

(c) the transfer by the first to second defendants was without express permission from the authorities;

(d) the second defendant was not a bona fide purchaser and the transfer was set aside; and

(e) the second defendant's counterclaimed was dismissed.

[11] The learned counsel for the appellant in the first appeal submitted as follows:

(a) the respondent's native certificate is a fake and there was a letter from native court that stated there is no record of any certificate issued to verify the status of the respondent;

(b) there were two cases in Tawau where the learned High Court judge there had ruled that the respondent had failed to prove her native status;

(c) as the respondent is not a native the transfer of land is prohibited under s 17 of the Sabah Land Ordinance;

(d) there is also prohibition by special conditions in the title that 'no rights or powers granted by this title should be transferred by the appointment of powers of attorney or any other means';and

(e) any contravention of the special terms will render the same unlawful, illegal, null and void under s 24 of the Contracts Act 1950.

[12] The respondent submission in respect of the first as well as the second appeal where she is the appellant is simple and straightforward. And simply asserts against weight of evidence inclusive of the decision in Tawau High Court that the respondent's native certificate is genuine and its validity could only be challenged in the Native Court of Sabah. And relies on the case of *Madlis bin Azid v Board of Offices (Pursuant to section 3(3) Interpretation Definition of Native) Ordinance (Sabah Cap 64) & Anor* [2012] MLJU 666 (BK-13JR-5/2 of 2012) where the court considered s 23 of the Administration of Natives and Small Estates Ordinance 1941 and s 16 of the Native Court Enactment 1992 and stated that the intention of legislature is clear and the High Court is not seized with original jurisdiction with matters relating to inheritance of native lands. The said part of the judgment reads as follows:

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> From the above legislations it is my view that the intention of the State Legislators is clear and that is the High Court is not seized with original jurisdiction with matters relating to inheritance of native lands according to native custom and shall sit only as a court of appeal or review. The original jurisdiction lies with the Native Court and when as in this case there is decision which had not been impugned, it is trite law that decision stands. That being the case, I agree with the submission that this Court has no jurisdiction to deal with the Plaintiff's claim.

(see *Joseph Paulus Lantip v Lian Kee Chu & Ors* [2011] 6 CLJ 399).

[13] We have read the appeal records and submission of the parties in detail. We are grateful to the comprehensive submission even though the learned counsel for the appeal No 4 did not file a written submission. After having given much consideration to the submission of the respondent, it is our considered view that the appeal should be allowed. Our reasons, inter alia, are as follows:

(a) In the instant case it is not only the status of the respondent as native that was challenged but it was also argued that there were restrictions on the title and one of it was the property can only be transferred by way of inheritance and the other is that 'power of attorney' or other means cannot be used to transfer the property.

(b) The restriction in title in the instant case does not permit the property to be acquired for the respondent's consumption and that too by way of instruments such as memorandum of understanding or escrow documents and/or power of attorney. The modus operandi of the respondent to acquire the property will be clearly in breach of the law and will also attract s 24 of Contract Act 1950 which will clearly deprive the respondent the right to specific performance as well as other relief claimed in the statement of claim.

(c) On the issue of 'native certificate' and its immutability, it must be first established before the High Court that it is genuine. The court is only restricted from inquiring whether or not the person holding a native certificate is in actual fact a native. In essence, the High Court, is only restricted from giving a declaration as to the status of native and the decision of the native court will be conclusive evidence for the particular purpose. This is set out in ss 3(2), (3) and (4) of the Interpretation (Definition of Native) Ordinance of Sabah (Cap 64) which reads as follows:

> (2) Subject to the provision of subsection (3) of this section, any Native Court referred to in subsection (1) to whom an application is properly made under such subsection shall have exclusive jurisdiction to entertain and determine any such application and to make such declaration as the case requires.

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> (3) Any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by subsection (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of officers appointed by the Yang di-Pertua Negeri for the purpose.
>
> (4) The final decision on any application made under subsection (1) shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates.

(d) It is trite when there are sufficient evidence in court to show the 'native certificate' is not genuine or the certificate has been obtained by unlawful means then the sting of illegality and its jurisprudence will entail the court not to allow the holder any relief pursuant to s 24 of the Contracts Act which states:

> 24 The consideration or object of an agreement is lawful, unless —
>
> (e) it is forbidden by a law;
>
> (f) it is of such a nature that, if permitted, it would defeat any law;
>
> (g) it is fraudulent;
>
> (h) it involves or implies injury to the person or property of another; or
>
> (i) the court regards it as immoral, or opposed to public policy.

(a) The learned trial judge failed to consider the effect of s 24 of the Contract Act 1950 in the right perspective. Having hold of a 'Native Certificate' alone does not mean the court can entertain claims which attract s 24 of CA 1950 (see s 92 EA 1950). For example, in a case where it is shown by evidence that the person is origin of Africa or in an Eskimo, etc; strict reliance of the statute without full reliance of common sense will compromise the integrity of administration of justice. In such cases the plaintiff will be barred from equitable relief such as specific performance or declaration.

Support for the above proposition can be found in the Evidence Act as well as a number of case laws. Section 44 of the EA 1950 states:

> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

[14] In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, Gopal Sri Ram observed:

> The principle then to be culled from the authorities is that a judgment may be impeached for deliberate fraud practised upon the court, and it is insufficient to show that a litigant merely convinced the court through misleading or erroneous

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evidence. Whether the test has been met in any given case must, I think, depend on the facts and circumstances of the particular case. But there is some guidance in the cases as to how fraud may be established. There is a most useful passage in *Satish Chandra v Satish Kantha Roy* AIR 1923 PC 73 at p 76:

> Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them - proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.

[15] The learned authors of *Pollock & Mulla, Indian Contract and Specific Relief Acts*, (10th Ed), J L Kapur, N M Tripathi Private Ltd 1986 at p 1063 cited Indian cases, and one of which relates to these observations:

> It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to *whether it is reasonable or not under all circumstances of the case to grant the relief prayed for.* (Emphasis added.)

[16] Leaving aside the native issue, the appeal ought to be allowed for other reasons stated above.

[17] In consequence, the first appeal is allowed with costs of RM5,000 each to each appellant in the first appeal.

THE SECOND APPEAL

[18] The appellant was the plaintiff and the respondents were the defendants in the High Court of Tawau. The grounds of judgment is at pp 11–15 of the appeal record Part A.

[19] We do not wish to elaborate much on the second appeal as the appellant here was also the respondent in the first appeal on similar facts but before the Tawau High Court which did not entertain her claim for specific performance, declaration and other reliefs on a different property. Whereby in the first appeal at Tawau High Court the present appellant was successful. In consequence of our decision in the first appeal the appellant's appeal in the second appeal is dismissed with costs of RM5,000.

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Appeal Nos 2939 and 3060 allowed and Appeal No 1089 dismissed with costs of RM5,000.

Reported by Ashok Kumar